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SUPREME COURT, U.S.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1979

No. 79-

DEWEY COLEMAN,

Petitioner,

v.

SENTENCE REVIEW DIVISION OF THE SUPREME COURT OF MONTANA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MONTANA

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IN THE

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October Term, 1979

No. 79-

DEWEY COLEMAN,

Petitioner,

-vs-

SENTENCE REVIEW DIVISION OF THE SUPREME COURT OF MONTANA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MONTANA

Petitioner Dewey Coleman prays that a writ of certiorari issue to review the judgment of the Supreme Court of Montana entered March 21, 1980, denying his application for a writ of supervisory control requiring the Sentence Review Division of the Supreme Court of Montana to review the sentences of death and imprisonment imposed upon him.

CITATION TO OPINIONS BELOW

The Order of the Supreme Court of Montana dismissing Petitioner's Application for a Writ of Supervisory Control, is unreported, and is set out as Appendix A of this Petition.

JURISDICTION

The order of the Supreme Court of Montana was entered on March 21, 1980. This Petition is being filed within 90 days of that date. Jurisdiction of this Court is invoked under 28 USC 1257(3), Petitioner having asserted below and asserting here

deprivation of rights secured by the Constitution of the United States.

QUESTION PRESENTED

Whether due process is denied, and the ex post facto clause of article I section 9 is violated, when a capital defendant is denied the state-created right to general appellate review of his sentences by retroactive application of statutory amendments and judicial decisions, occurring after the date of the crime for which he was convicted, withdrawing the right to such review in capital cases.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the ex post facto clause of Article I, Section 9, and the due process clause of the Fourteenth Amendment, of the Constitution of the United States.

This case also involves the following provisions of Montana Law:

Chapter 196, Section 1, Montana Laws of 1967:

> Section 95-2211 (repealed 1977):
> Every sentence shall be subject to review in accordance with Chapter 25, Review of Sentence.
>
> Section 2501 (now MCA 46-18-901 and 902):
> The chief justice of the supreme court of Montana shall appoint three district court judges to act as a review division of the supreme court and shall designate one of such judges to act as chairman thereof. The clerk of the Montana supreme court shall record such appointment and shall give notice thereof to the clerk of every district court.
> This review division shall meet at least four times a year or more as its business requires, as determined by the chairman. The review division shall hold its meetings at Deer Lodge.
> The decision of any two of such judges shall be sufficient to determine any matter before the review division.
> The review division may adopt any rules which will expedite its review of sentences. The division is also authorized to appoint a secretary and such clerical help as it deems adequate and fix their compensation.
> No judge shall sit or act on a review of sentence imposed by him. In any case in which review of a sentence imposed by any of the judges serving on the review division is to be acted on by said division, the

chief justice of the supreme court of Montana may designate another judge to act in his place.

Section 95-2502 (now MCA 46-18-903):

Any person sentenced to a term of 1 year or more in the state prison by any court of competent jurisdiction may within 60 days from the date such sentence was imposed, except in any case in which a different sentence could not have been imposed, file with the clerk of the district court in the county in which judgment was rendered an application for review of the sentence by the review division. Upon imposition of the sentence, the clerk shall give written notice to the person sentenced of his right to make such a request. Such notice shall include a statement that review of the sentence may result in a decrease or increase of the sentence within the limits fixed by law.

The clerk shall transmit such application to the review division and shall notify the judge who imposed the sentence and the county attorney of the county in which the sentence was imposed. Such judge may transmit to the review division a statement of his reasons for imposing the sentence and shall transmit such a statement within 7 days if requested to do so by the review division.

The review division may for cause shown consider any late request for review of sentence and may grant such request.

The filing of an application for review shall not stay the execution of the sentence.

Section 95-2503 (now MCA 46-18-904 and 905):

In each case in which an application for review is filed in accordance with section 95-2502, the review division shall review the judgment so far as it relates to the sentence imposed, either increasing or decreasing the penalty, and any other sentence imposed on the person at the same time and may order such different sentence or sentences to be imposed as could have been imposed at the time of the imposition of the sentence under review or may decide that the sentence under review should stand. In reviewing any judgment, said division may require the production of presentence reports and any other records, documents or exhibits relevant to such review proceedings. The appellant may appear and be represented by counsel, and the state may be represented by the county attorney of the county in which the sentence was imposed.

If the review division orders a different sentence, the court sitting in any convenient county shall resentence the defendant as ordered by the review division. Time served on the sentence reviewed shall be deemed to have been served on the sentence substituted.

The decision of the review division shall be final, and the reasons for such decision shall be stated therein. The original of each decision shall be sent to the clerk of the court for the county in which the judgment was rendered, and a copy shall be sent to the judge who imposed the sentece reviewed, the person sentenced, and the principal officer of the institution in which he is confined.

The decision shall be reported in the Montana Reports.

Chapter 338, section 8, Montana Laws of 1977
(now MCA 46-18-308)

> The judgment of conviction and sentece of death are subject to automatic review by the supreme court of Montana within 60 days after certification by the sentencing court of the entire record unless the time is extended by the supreme court for good cause shown. The review by the supreme court has priority over all other cases and shall be heard in accourdance with rules promulgated by the supreme court. The sentence review shall be in addition to direct appeal, if taken, and the review and appeal shall be consolidated for consideration.

Chapter 338, section 9, Montana Laws of 1977
(now MCA 46-18-310):

> The supreme court shall consider the punishment as well as any errors enumerated by way of appeal. With regard to the sentence, the court shall determine:
>
> (1) whether the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor;
>
> (2) whether the evidence supports the judge's finding of the existence or nonexistence of the aggravating or mitigating circumstances enumerated in 46-28-304; and
>
> (3) whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant. The court shall include in its decision a reference to those similar cases it took into consideration.

STATEMENT OF THE CASE

This Petition seeks review of the Montana Supreme Court's denial of Petitioner Dewey Coleman's Application for a Writ of Supervisory Control requiring the Sentence Review Division of the Montana Supreme Court to review his sentences of death and imprisonment in accordance with the law in effect at the time of his alleged crime and initial conviction.

1. Changes in Montana Law Governing Sentence Review During The Initial Proceedings In Petitioner's Case.

Since 1967, Montana law has provided for appellate review of criminal sentences, conducted by a "review division" of "three district court judges" appointed by the chief justice of the Montana Supreme Court. Chapter 196, Section 1, Montana laws of 1967 at §95-2501.[1] By that law, "[a]ny person sentenced to a term of one year or more in the state prison" was given the right to "file . . . an application for review of the sentence by the review division" and to "appear and be represented by counsel." Id. at §95-2502 and 2503. The division was empowered the division to "require the production of presentence reports and any other records" and "review the judgment so far as it relates to the sentence imposed, either increasing or decreasing the penalty, and any other sentence imposed on the person at the same time," or "decide that the sentence under review should stand," stating in either case the "reasons for" its decision. A separate subsection of the same law made it explicit that "every sentence shall be subject to review in accordance with Chapter 25, review of sentence." Id. at §95-2211.

These provisions were all in effect on July 4, 1974, when Peggy Harstad was kidnapped and murdered, and on November 14,

---

[1]Montana Laws of 1967, Chapter 196, Section 1 §§95-2501ff is now codified as M.C.A. 46-18-901ff. For clarity in describing the law in effect at the time of Petitioner's alleged crime, citations here are to the provisions of the law as at that time.

1975, when Petitioner was convicted of and sentenced to death for that crime. During the pendency of Petitioner's appeal from that conviction, in November, 1976 the Montana Supreme Court decided the first capital case to come before it after Furman v. Georgia, 408 U.S. 238 (1972), and held that the right to Sentence Review applied to "all sentences," including sentences of death. State v. McKenzie, 171 Mont. 278, 557 P.2d 1023, 1032 (1976). The next year the defendant in the McKenzie case (who was tried in 1975) was afforded review of his sentence by the Sentence Review Board. See State v. Coleman, ___Mont. __, 605 P2d 1000, 1006 (1979); McKenzie v. Montana, No. 78-5617.

Also in 1977--still during the pendency of Petitioner's first appeal--Montana law was amended in two ways relevant here. First, by Section 64, Chapter 184, of the laws of 1977, the guarantee (codified in former RCM 1947 §95-2201) that "every sentence shall be subject to review" was repealed. Second, by Chapter 338 of that year's laws, the procedures in Montana capital cases were changed. Among the changes effected by that Chapter was the provision for consideration by the Supreme Court of "the punishment as well as any errors enumerated by way of appeal" in light of certain specific considerations.[2]

Petitioner's first appeal resulted in the vacation of his death sentence, because of the unconstitutionality under Woodson v. North Carolina, 428 U.S. 305 (1976), of the statute which made

---

[2] Id. at Sec. 10 (now M.C.A. 46-18-310). The Supreme Court is to consider in making this review

> (1) whether the sentence of death was imposed under influence of passion, prejudice, or any other arbitrary factor;
>
> (2) whether the evidence supports the judge's finding of the existence or nonexistence of the aggravating or mitigating circumstances . . . and
>
> (3) whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant. The court shall include in its decision a reference to those similar cases it took into consideration.

it mandatory. State v. Coleman, ___ Mont. ___, 579 P.2d 732 (1977). On remand, however, he was resentenced to death under Montana's newly-enacted, supposedly discretionary death sentencing laws. In State v. Coleman, ___ Mont.___, 606 P.2d 1000 (1979) that sentence was upheld; and in its decision upholding it the Montana Supreme Court sua sponte reversed its position regarding the availability of sentence review in capital cases:

> We recognize that in McKenzie the Sentence Review Division was allowed to conduct a review of the death penalty imposed, however, the defendant in McKenzie was sentenced under statutes different from those involved in this appeal . . . because the review conducted by this Court statutorily stands in place of any recourse to the Sentence Review Division, the completion of this review will mark the end of the State action upon this cause, except any action upon a petition for rehearing.

606 P.2d at 1006. Petitioner's application for rehearing of that decision was denied. 606 P.2d 1051.

2. Proceedings Below.

On January 23, 1980 Petitioner filed a timely Application for Review of Sentence by the Sentence Review Division. Appendix C. On February 26, 1980, the Application was denied, by a decision of the Division in which it held "as a matter of law" that it had "jurisdiction to only review sentences to the state prison and not death sentences," citing the Code provisions enacted in 1977 providing for a different sentence review procedure in capital cases in the state Supreme Court. Decision, Appendix B. From that decision, Petitioner sought a Writ of Supervisory Control in the Montana Supreme Court--asking that the Sentence Review Division's decision be reversed, and review of his sentences by required--on the ground that the statutes in effect at the time of his crime, as construed, afforded him the right to such sentence review and "the ex post facto provisions of the United States Constitution and the Montana Constitution

clearly provide that no law can be passed which can take away rights of a defendant." Brief Supporting Application at 7. On March 21, 1980, the Supreme Court denied that application for a writ, holding that "the Sentence Review Division's decision was correct" and "with respect to the death sentence, the only statutory agency with power to review is this court."

> We have fulfilled our duties in that connection. It would not only be extra-statutory but an anomoly were we to hold that the conclusions of this court on review of death sentences were subject to later review by the Sentence Review Division of this court.

Appendix A at 2. The Court did not expressly address the constitutional arguments that Petitioner had raised.

HOW THE FEDERAL QUESTIONS WERE RAISED AND DECIDED BELOW

In Petitioner's application for sentence review, no legal argument was permitted and none made. In support of his application for Writ of Supervisory Control to the Montana Supreme Court, he argued, inter alia, that the statute in effect at the time of his crime gave him a right to sentence review, and "the ex post facto provisions of the United States Constitution and of the Montana Constitution clearly provide that no law can be passed which takes away rights of the defendant." Brief Supporting Application at 7. The Montana Supreme Court, in its decision denying Petitioner's Application, recited Petitioner's argument "that the statute (section 95-221 [sic]) in effect at the time of his crime (since amended) provided for review," but did not address its constitutional implications.

REASONS FOR GRANTING THE WRIT

Certiorari should be granted here to decide whether the retroactive withdrawal of general sentence review previously provided by state law, violates the constitutional prohibition of ex post facto laws in Article I, section 5. This case presents "the serious question" of whether the repeal and restriction of a procedure by which sentence may be reduced,

after the commission of a crime and the initial imposition of sentence, violates the ex post facto clause because it "impose[s] a 'greater or more severe punishment than was prescribed by law at the time of the . . . offense.' Rooney v. North Dakota, 196 U.S. 319, 325." Warden v. Marrero, 417 U.S. 653, 663 (1974) (original emphasis).

In this case "the law annexed to the crime when committed," Calder v. Bull, 3 U.S. (3 Dall.) 386, 390 (1798) extended the statutory right to "file . . . an application for review of the sentence by the review division," RCM 1947 §95-2502 to "[e]very sentence," RCM 1947 §95-2211, including capital sentences. State v. McKenzie, 171 Mont. 278, 557 P.2d 1023, 1032 (1976), vacated on other grounds 433 U.S. 905 (1977). But, by changes in that law occurring during the pendency of Petitioners case which "alter[ed] the situation of the accused to his disadvantage," In re Medley, 134 U.S. 160, 171 (1890), that right was denied here.

Sentence Review as it existed at the time of Petitioner's alleged crime, conviction and first appeal, was broadly "designed to determine the appropriateness of the sentence with respect to the individual offender and particular offense." State v. McKenzie, ___ Mont. ___, 581 P.2d 1203, 1229 (1978), vacated on other grounds 442 U.S. ___ (1979). The law then gave any convicted person the "right to have his sentence reviewed for equity, disparity, or considerations of justice," State ex rel. Greely v. District Court, ___ Mont. ___, 590 P.2d 1104, 1110 (1979). The sentence review afforded here, instead--under statutes passed two years after Petitioner's alleged crime--was much more limited, and afforded relief only upon a finding of "discriminatory action . . . [or] abuse of discretion by the sentencing judge," based on certain limited considerations. State v. Coleman, supra at 605 P.2d

1058. Once the Montana Supreme Court found no such abuses in Petitioner's case, and found his sentence proportional to the two other "cases where the sentence has been imposed" that had reached its "attention through the appellate process," its review was complete. Id. at 605 P.2d 1020-1022. No general inquiry into questions of "equity . . . or considerations of justice" was permitted, and none made.[3]

It was "plainly to the substantial disadvantage of petitione[r] to be deprived of all opportunity to receive" a reduced sentence through these formerly-guaranteed procedures and based on these intangible considerations, Lindsey v. Washington, 301 U.S. 397, 402 (1937), and because of that the withdrawal of that opportunity violated the ex post facto

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[3]The Montana Supreme Court, on rehearing in Coleman's case, set out explicitly the limits it saw in its sentence review under the new statute:

> We take our duty to be, in connection with whether the death sentence is disproportionate, that we should review the circumstances of the crime of which the defendant is accused, and in light of those circumstances, the judgment and the sentence thereupon imposed; and, examine cases involving similar crimes, all for a single purpose, to make certain that as far as the defendant in this case, Coleman, is concerned, there has been no discriminatory action on the part of the sentencing judge, no abuse of discretion by the sentencing judge, and that the sentencing judge has considered and applied fairly without discrimination the applicable law. We find this to be true in this case. It should be understood that in the final analysis, the imposition of sentence is not one that this court must undertake. That matter is still reserved under our statutes to the District Courts. There is a discretion vested in the District Court in capital cases as to whether the death penalty should be imposed. Once that discretion has been exercised, and if we find that it has been exercised fairly, indiscriminately and in accordance with the applicable statutes, then it must be upheld.

605 P.2d at 1058.

law prohibition of Article I, section 9. Lindsey v. Washington closely resembles, if it does not clearly control, this case. In Lindsey, as here, an avenue of possible discretionary reduction of sentence was removed after commission of the crimes there involved. 301 U.S. at 398. In Lindsey, as here, the petitioners could have received the same sentence they did under the new law, under the old. 301 U.S. at 401. In Lindsey, as here, the principal change effected by the enactment of the new statute was in the locus and nature of the discretion to reduce the length of a sentence in a given case from the maximum provided for by law. 301 U.S. at 398-9. The Court in Lindsey, acknowledging this, said it was unnecessary to "inquire whether this is technically an increase in the punishment annexed to the crime;" the fact it was "plainly to the disadvantage of [defendants] to be deprived of all opportunity to receive" a reduced sentence was sufficient to run afoul of the ex post facto clause. 301 U.S. at 402.

The only distinction between this case and Lindsey is that here the change in the law did not withdraw "all opportunity" for a reduced sentence. But it nonetheless changed the procedure and forum by which a reduction is sought, and--more importantly--limited the grounds on which one can be granted. It seems unquestionable that such a substantive change in the criteria by which a criminal defendant can seek reduction of the penalty imposed on him squarely violates the ex post facto clause, whether it affects the standards by which guilt and sentence are determined, Kring v. Missouri, 107 U.S. 221 (1883), or the avenues by which sentence reduction can be attained after conviction, Greenfield v. Scafati, 390 U.S. 713 (1968) (per curiam). In the various contexts in which such questions have arisen in post-conviction procedings, lower courts have generally, though not unanimously, recognized this.

See Note, Ex Post Facto Limitations on Legislative Power, 73 MICH. L. REV. 1491, 1503 n.42 (1975), and cases there cited.

This case warrants this Court's attention because of the gravity of the context in which the issue here arises, and the potential for recurrence of this issue in Montana and in other states which have lately enacted, as Montana has, sentence review schemes based on that approved in Gregg v. Georgia. Petitioner respectfully suggests that the clear impropriety, under the ex post facto clause, of removing and limiting an avenue for reduction of a capital sentence (cf. Lindsey v. Washington, supra at 301 U.S. 401) may justify summary reversal in this case.

CONCLUSION

For the above reasons the writ of certiorari should be granted.

Respectfully submitted,

Charles F. Moses

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June 11, 1980.

APPENDIX A

A-1

IN THE SUPREME COURT OF THE STATE OF MONTANA

No. 80-89

STATE OF MONTANA EX REL.
DEWEY EUGENE COLEMAN,

Petitioner,

vs.

SENTENCE REVIEW DIVISION
OF THE SUPREME COURT OF
MONTANA,

Respondent.

ORDER ON APPLICATION FOR
WRIT OF SUPERVISORY CONTROL

In an original proceedings before this Court, relator Dewey Eugene Coleman petitions for a writ of supervisory control addressed to the Sentence Review Division of the Supreme Court.

Coleman was found guilty of (1) deliberate homicide, (2) aggravated kidnapping, and (3) sexual intercourse without consent on November 14, 1975 and judgment was entered against him by the District Court, Sixteenth Judicial District, Rosebud County, Montana. He was sentenced to hang on the aggravated kidnapping charge, to 100 years in prison for the deliberate homicide, and 40 years on the intercourse charge.

He has twice appealed to this Court. In the second appeal on June 20, 1979, in State v. Coleman, ___ Mont. ___, 605 P.2d 1000, 36 St.Rep. 1134, we affirmed all such sentences, and later denied rehearing after oral argument in our decision found at (December 19, 1979), ___ Mont. ____, 605 P.2d 1051, 36 St.Rep. 2237.

Following the denial of his petition for rehearing, relator petitioned the Sentence Review Board applying for

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CLERK OF SUPREME COURT
STATE OF MONTANA

sentence review of all three sentences imposed upon him. On February 26, 1980, the Sentence Review Board denied such review. Thereupon the relator petitioned us in this cause asking us to order a review of his sentences by the Sentence Review Board.

Relator's contentions here are that the forms for sentence review were given to him by the Clerk of the District Court and a deputy sheriff of Rosebud County, Montana; that his application for review was denied without argument or hearing; that he relied on the agents of the state who gave him instructions on how to file for review; that the statute (section 95-221, R.C.M. 1947) in effect at the time of his crime (since amended) provided for review; that review was granted in Montana to a similar defendant in State v. McKenzie (1977), 171 Mont. 278, 557 P.2d 1027; that two of his sentences entitle him to review; that this Court did not review similar cases when it reviewed his death sentence; and that he has been deprived of due process and the equal protection of the law.

The review application by relator was denied by the Sentence Review Division on the ground of lack of jurisdiction. It pointed out that review of sentences is available only to persons sentenced to a term of one year or more in the state prison, section 46-18-903, MCA, and that it had no jurisdiction to review death sentences. It also pointed to section 46-18-307, MCA, which provides for automatic review of death sentences by the Montana Supreme Court.

We hold that the denial of review by the Sentence Review Division was correct. With respect to the death sentence, the only statutory agency with power to review is this Court. We have fulfilled our duties in that connection. It would not only be extra-statutory but an anomaly were we to hold that the conclusions of this Court on review of death sentences

were subject to later review by the Sentence Review Division of this Court.

At this moment the relator is under sentence of death for aggravated kidnapping. As long as that sentence remains in force, it would be a useless act for the Sentence Review Division to undertake review of the jail terms on the other two charges on which relator was convicted. Because we understood that relator intends to petition some federal court with respect to his death sentence, we will hold in abeyance his sentence review on the jail time until such time, if ever, as it would appear appropriate to allow such review.

THEREFORE, IT IS ORDERED:

1. The relator's petition for a writ of supervisory control in this cause is denied.

2. This order is without prejudice if at some future date it appears that his death sentence is no longer in force, and an otherwise proper application for sentence review is made by relator.

3. Copies hereof shall be mailed by the Clerk of this Court to the relator's attorneys of record, the Attorney General of the State of Montana, the County Attorney of Rosebud County, Montana, and the Clerk of the District Court of the Sixteenth Judicial District, Rosebud County, Montana.

DATED this 21st day of March, 1980.

Frank I. Haswell
Chief Justice

John Conway Harrison
John C. Sheehy
Daniel J. Shea
Justices

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MOTION BY DEWEY COLEMAN, PETITIONER, TO PROCEED IN FORMA PAUPERIS

DEWEY COLEMAN, petitioner, moves the Court for an order permitting him to proceed in this Court in forma pauperis in petitioning for a writ of certiorari to the Supreme Court of Montana, from the decision of such Court decided and filed March 21, 1980 (not reported) (copy attached to Petition for Writ of Certiorari), pursuant to the provisions of Title 28 U.S.C. Section 1915 and Rule 53 of the Rules of this Court, and in support thereof, attaches the affidavit of his counsel, Charles F. Moses, and his affidavit.

Pursuant thereto, petitioner moves that he be authorized to proceed on such petition for writ of certiorari without prepayment of fees and costs or security therefor,

that his brief thereon be printed by the Court, and that his present counsel, Charles F. Moses, be appointed to represent him thereon.

Dated June 16, 1980.

Charles F. Moses
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300 North 25th Street
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BY: Charles F. Moses
Charles F. Moses

ATTORNEYS FOR PETITIONER
DEWEY COLEMAN

file room

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AFFIDAVIT OF DEWEY COLEMAN

STATE OF MONTANA)
: ss.
County of Powell)

DEWEY COLEMAN, being duly sworn, deposes and says:

1. I am a citizen of the United States and the petitioner in this action.

2. I desire to petition for a writ of certiorari to the Supreme Court of Montana from their opinion dated and filed March 21, 1980, but because of my poverty, I am unable to pay the costs of such petition, give security therefor, or pay the legal fees for my attorney, Charles F. Moses, to represent me thereon.

3. I am presently incarcerated in the Montana State Prison at Deer Lodge, Montana.

4. Following the discharge of an earlier court-appointed attorney, Charles F. Moses was appointed by the Montana District Court, Rosebud County, Montana, to represent me on the trial of this cause before such Court, and he represented me at the trial thereon. Thereafter, by order of such District Court, and as provided in the trustee agreement I made with Charles F. Moses, certain funds which had then been received by me, and while I was incarcerated awaiting trial, and thereafter, were applied on the legal fees and costs due for such representation on the District Court trial level, and the balance of such fees and costs were paid by Rosebud County, Montana pursuant to the Court's order therefor. Thereafter, and under such trust agreement, the payments due me monthly under Social Security and from the Veterans Administration have been deposited in such trustee account, under the management of my trustee, Charles F. Moses, and from such funds, certain monthly personal expenses of mine have been paid, and other expenses paid including certain additional required dental work for me not taken care of by the Montana State Prison, and the balance of such funds have been paid towards the costs and legal fees incurred on my first appeal to the Montana Supreme Court, the resentencing proceedings, the second appeal to the Montana Supreme Court, the petition for rehearing granted thereon, and the proceedings before the Sentence Review Division. Such income has basically allowed the payment to my attorney of the costs incurred in such matters, but not any payment on the legal fees due therefor, and there is presently due from

me to such attorney a sum in excess of $10,000 for such legal fees and costs.

5. On April 4, 1980, I filed a petition for certiorari before this Court asking that relief be granted, but which however was denied by this Court on May 27, 1980. The costs of printing that petition for certiorari and the appendix, totaled $4,009.76, plus the docket fee therefor of $100.00. I have only been able to pay $900.15 toward this printing cost, and my present monthly income will not permit this total printing bill to be paid for approximately another 10 months to one year, which together with my personal expenses will exhaust all funds due me for the next year, even without paying any legal fees to my counsel.

6. Therefore, and certainly for at least the next one year period I am a pauper and unable to pay the filing fee and printing costs for such a petition, and would request that I be allowed to proceed thereon in forma pauperis. I further request that the Court appoint my present attorney, Charles F. Moses, to represent me on such petition.

7. I own no real property or interest therein, own only certain inexpensive personal items allowed me by the Montana State Prison authorities, and have no other property, assets, cash, bank accounts, other than the trust account which is described in the affidavit of my attorney and trustee, Charles F. Moses, included herein.

8. I believe that I am entitled to a petition for a writ of certiorari and that the decision of the Montana Supreme Court should be reversed.

9. The nature of the questions to be presented on such petition for writ of certiorari are as set forth in such petition, which is filed with this Court at the

same time as this motion is filed, and includes the questions raised to the Montana Supreme Court relating to the failure of petitioner to be granted sentence review as to his conviction and sentences received, and without due process thereon.

WHEREFORE, Affiant prays that he may have leave to proceed in this Court on such petition for a writ of certiorari in forma pauperis.

Dated June 18, 1980.

Dewey Coleman
DEWEY COLEMAN

SUBSCRIBED AND SWORN to before me this 18 day of June, 1980.

David M. Scott
Notary Public for the State of Montana
Residing at Deer Lodge, Montana
My commission expires: _____

(SEAL)

NOTARY PUBLIC for the State of Montana
Residing at Deer Lodge, Montana
My Commission Expires Nov. 27, 19-4

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1979

No. 79-

DEWEY COLEMAN,

Petitioner,

-vs-

SENTENCE REVIEW DIVISION OF THE SUPREME COURT OF MONTANA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MONTANA

AFFIDAVIT OF CHARLES F. MOSES

STATE OF MONTANA)
: ss.
County of Yellowstone)

CHARLES F. MOSES, being duly sworn, deposes and says:

1. I am an attorney licensed to practice law and admitted to the practice of law in all the courts in the State of Montana, the federal district court for Montana, the Ninth Circuit Court of Appeals, and the Supreme Court of the United States, and I have represented Dewey Coleman since being appointed by the Rosebud County District Court therefor.

2. Following the conclusion of the District Court trial, I submitted my statement of fees and costs for approval to the State District Court Judge, who thereafter approved the same, ordered that portion paid

from the funds then available to Dewey Coleman, with the balance of the fees then paid by Rosebud County, Montana.

3. Following such District Court trial, by order of such District Court, and by a trustee agreement, I was appointed as trustee for Dewey Coleman, to receive all funds payable to him by Social Security and the Veterans Administration, and to expend such funds for his personal uses, and for the costs and legal fees for appellate procedures on his behalf.

4. At the present time, Dewey Coleman receives monthly a Social Security check of $382.80, and a Veterans Administration check of $48.00, which checks are deposited in a trustee account in a bank in his name. Certain funds are then disbursed each month for personal uses by Dewey Coleman, and for payment of other expenses incurred by him, including several dental bills for dental work required for him and not supplied by the Montana State Prison. The balance of all such funds have been used since that date to pay the costs incurred in the appellate processes on his behalf, with a small portion thereof being applied to the legal fees due.

5. At the present time, the legal fees and costs shown due, are in excess of $10,000. In addition, there is now due the printing company that printed the petition for certiorari and appendix on Dewey Coleman's first petition for certiorari to this Court, totaling $4,009.76. $900.15 has been taken from his account to apply on this, leaving a balance there of $93.00.

6. Based on the present expenditures from such trust account, it will be approximately 10 months before such prior printing bill can be paid in full and until that

time there are no funds available to Dewey Coleman to apply as to this petition for certiorari, or as to any other further costs required to be incurred thereon, or in connection with appellate process to secure him relief.

7. It is my opinion and I have so advised Dewey Coleman that his petition for a writ of certiorari has merit and that the decision of the Montana Supreme Court thereon should be reversed.

Dated June 16, 1980.

Charles F. Moses

CHARLES F. MOSES

SUBSCRIBED AND SWORN to before me this 16th day of June, 1980.

Marilyn Sewell

Notary Public for the State of Montana
Residing at Billings, Montana
My commission expires June 10, 1981.

(SEAL)

NO. 79-6794

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1979

DEWEY COLEMAN,

Petitioner,

-v-

SENTENCE REVIEW DIVISION OF
THE SUPREME COURT OF MONTANA,

Respondent.

On Writ Of Certiorari To The
Supreme Court Of Montana

RESPONDENT'S BRIEF IN OPPOSITION

APPEARANCES:

MICHAEL T. GREELY
Attorney General
State of Montana
State Capitol
Helena, Montana 59601
(406) 449-2026

JOHN S. FORSYTHE
Rosebud County Attorney
Forsyth, Montana 59327

COUNSEL FOR RESPONDENT

NO. 79-6794

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1979

DEWEY COLEMAN,

Petitioner,

-v-

SENTENCE REVIEW DIVISION OF
THE SUPREME COURT OF MONTANA,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION

The respondent respectfully requests that this Court deny the petition for writ of certiorari, seeking review of the Montana Supreme Court's Order on Application for Writ of Supervisory Control. A copy of the order is appended to the petition.

REASONS WHY THE WRIT SHOULD BE DENIED

1. The petition does not raise a substantial federal question.

Petitioner's ex post facto contention is based on the fact that the procedure for appellate review in the Montana capital-sentencing system was changed in 1977 to provide for automatic review by the supreme court of Montana in place of the review previously afforded by a division of the supreme court. The substitution of the supreme court in the capital-sentencing system followed this Court's decision in Gregg v. Georgia, 428 U.S. 153 (1976), and is consistent with the principles stated in that opinion.

Dobbert v. Florida, 432 U.S. 282, 293 (1977), disposes of petitioner's ex post facto claim by recognizing that

"[e]ven though it may work to the disadvantage of a defendant, a procedural change is not ex post facto." The change did not affect the crime for which petitioner was convicted, the punishment prescribed for that crime, or the quantity or degree of proof required to convict. In short, petitioner's claim does not raise a federal question, but only a matter of procedure within the discretion and authority of the State of Montana.

CONCLUSION

For these reasons, the petition for writ of certiorari should be denied.

Respectfully submitted this 18th day of July 1980.

MICHAEL T. GREELY
Attorney General
State of Montana
State Capitol
Helena, Montana 59601

JOHN S. FORSYTHE
Rosebud County Attorney
Forsyth, Montana 59327

By Michael T. Greely
MICHAEL T. GREELY
Attorney General

NO. 79-6794

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1979

DEWEY COLEMAN,

Petitioner,

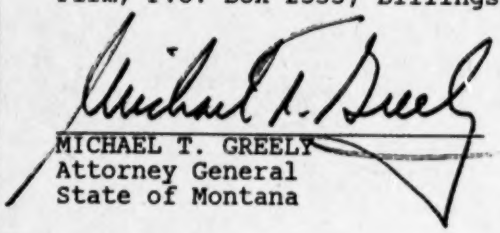
-v-

SENTENCE REVIEW DIVISION OF
THE SUPREME COURT OF MONTANA,

Respondent.

CERTIFICATE OF SERVICE

I hereby certify that on this 18th day of July 1980 a copy of Respondent's Brief in Opposition to Certiorari was mailed, postage prepaid, to Charles F. Moses, Moses Law Firm, P.O. Box 2533, Billings, Montana 59103.



MICHAEL T. GREELY
Attorney General
State of Montana

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1979

NO. 79-6794

ORIGINAL COPY

DEWEY COLEMAN,

Petitioner,

-vs-

SENTENCE REVIEW DIVISION OF
THE SUPREME COURT OF MONTANA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO
THE SUPREME COURT OF MONTANA

PETITIONER'S REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

APPEARANCE:

CHARLES F. MOSES
MOSES LAW FIRM
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Billings, Montana 59103
(406) 248-7702

COUNSEL FOR PETITIONER

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1979

NO. 79-6794

DEWEY COLEMAN,

Petitioner,

-vs-

SENTENCE REVIEW DIVISION OF
THE SUPREME COURT OF MONTANA,

Respondent.

PETITIONER'S REPLY TO RESPONDENT'S

BRIEF IN OPPOSITION

Petitioner Dewey Coleman respectfully submits this reply brief to respondent's brief in opposition.

It does not appear that the respondent disputes petitioner's material claims, except to contend that petitioner's "contention is based on the fact that the procedure for appellate review in the Montana capital-sentencing system was changed in 1977 to provide for automatic review by the Supreme Court of Montana in place of the review previously afforded by a division of the Supreme Court." (Resp. Br. 1), and to contend that Dobbert v. Florida, 432 U.S. 282 (1977), holds that "a procedural change" cannot violate the constitutional ex post facto clause.

This is not correct, as petitioner's application for certiorari clearly points out that the 1977 repeal of Section 95-2211, R.C.M., 1947, and as interpreted by the Montana Supreme Court, completely eliminated petitioner's

clear statutory right to a hearing before the Sentence Review Division of the Supreme Court of Montana on a request by him to mitigate the sentences imposed upon him, including a request that his death sentence be changed to some term of years. Before the repeal of this law, and at the time this petitioner committed his alleged crimes, and at the times he was tried and convicted thereon, and received his first sentences thereon, and following all appellate proceedings before the Montana Supreme Court, including a review by that Court of his sentences, this petitioner could then have, following a hearing before the Sentence Review Division, had his death sentence mitigated and changed to a term of years. This does not appear to be the "procedural change" contemplated in Dobbert.

As this appears to clearly violate the constitutional ex post facto restriction, this petitioner contends that the State of Montana should be ordered to provide him sentence review.

Respectfully submitted,

CHARLES F. MOSES
MOSES LAW FIRM
300 North 25th Street
P. O. Box 2533
Billings, Montana 59103

BY: Charles F. Moses
CHARLES F. MOSES

ATTORNEYS FOR PETITIONER

August 25, 1980.